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In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM PRENTIS TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that (1) he was entitled to both a preliminary and a final hearing before his probation could be revoked, despite the fact that he was in custody at the time that the government began revocation proceedings, and (2) his probation revocation was improperly based on conduct occurring after sentencing but before the probationary term had commenced.

Following a non-jury trial in the United States District Court for the Middle District of Georgia,

petitioner, a convicted felon, was found guilty of receiving a firearm in interstate commerce, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to two years' imprisonment, with all but six months suspended, and five years' probation. The court of appeals affirmed (502 F.2d 944), and this Court denied certiorari, 420 U.S. 946.

On March 19, 1975, petitioner surrendered himself to begin serving his six-month prison sentence.[1] He was then advised that the government had petitioned to revoke his probation because of gambling activities he had engaged in during the pendency of his appeal. After a brief non-evidentiary hearing on March 21,[2] the court set March 27 as the date for a formal probation revocation hearing (March 21 Tr. 19-20).

At the revocation hearing, the government presented the testimony of four United States Treasury agents and a Macon, Georgia, police officer, who identified petitioner as the person who in February 1975

[1] Petitioner had been free on bail pending appeal.

[2] Although the government was prepared to proceed with a formal revocation hearing on March 21, petitioner sought a continuance, to be followed by a preliminary hearing to determine whether there was probable cause to believe that he had violated the terms of his probation (March 21 Tr. 1-3). The court denied petitioner's request for both a preliminary and a formal hearing, holding that such a procedure was unnecessary since petitioner was already lawfully incarcerated as a result of a conviction. However, the court offered to allow the government to present its evidence at the March 21 hearing and then to permit petitioner to cross-examine, introduce evidence, and argue the merits at a later date. Petitioner declined this invitation (March 21 Tr. 10-15).

had retrieved lottery materials from a "pick-up" point as part of an illegal gambling operation (March 27 Tr. 3-6, 7-11, 14-20, 21-22, 23-33). The court thereupon revoked petitioner's probation and reinstituted the portion of his sentence that had previously been suspended (March 27 Tr. 62-63).[3] The court of appeals affirmed (Pet. App. A).

1. Relying on *Gagnon* v. *Scarpelli*, 411 U.S. 778, and *Morrissey* v. *Brewer*, 408 U.S. 471, petitioner contends (Pet. 5-10) that, in addition to holding a formal revocation hearing, the district court was required to hold a preliminary hearing to determine whether there was probable cause to believe that he had violated his probation. The court of appeals correctly rejected this claim since, as this Court recognized in *Morrissey*, "not all situations calling for procedural safeguards call for the same kind of procedure." 408 U.S. at 481. The rationale underlying the dual hearing procedure mandated in *Gagnon* and *Morrissey* was that a defendant released on parole or probation should not be subject to arrest and detention pending a formal revocation hearing without a judicial determination that there was sufficient reason to deprive him of his conditional liberty. Thus,

[3] Petitioner's claim (Pet. 14) that the court knew of his lottery activities at the time that the period of probation was imposed is belied by the record. Petitioner was sentenced on April 22, 1974, but the lottery activities that precipitated the revocation of his probation did not occur until February 1975 (Pet. App. D). Although the district court was aware that petitioner had been involved in gambling activities in the past, the court obviously did not expect that petitioner would resume his illicit activities following sentencing.

the Court required a preliminary hearing when a parolee (or probationer) was arrested for a parole (or probation) violation because

> the parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society * * *. * * * [H]is condition is very different from that of confinement in a prison.

Morrissey v. *Brewer*, *supra*, 408 U.S. at 482.

By contrast, petitioner was already lawfully incarcerated at the inception of the probation revocation proceedings, so he would have been afforded no additional protection from a preliminary hearing to determine whether there was probable cause to warrant his detention for the violation of probation.[4] He did not stand to lose his "conditional liberty" or otherwise "to suffer grievous loss." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 480, 481. Nor did petitioner face either "a substantial time lag between the arrest and the eventual [revocation] determination" or an arrest "at a place distant from the state institution, to which [a probationer] may be returned before the final [revocation decision]." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 485. Thus, petitioner's rights were

[4] The preliminary hearing under *Morrissey* and *Gagnon* is analogous to an initial appearance before a magistrate to determine probable cause following a warrantless arrest. Rule 5, Fed. R. Crim. P. Rule 5 is inapplicable if the defendant is already in custody pursuant to an unrelated conviction. *United States* v. *Smith*, 464 F.2d 194, 196-197 (C.A. 10), certiorari denied, 409 U.S. 1066; *United States* v. *Reid*, 437 F.2d 1166 (C.A. 7).

fully safeguarded by the formal revocation hearing that the district court expeditiously conducted. See *United States* v. *Strada*, 503 F.2d 1081, 1084 (C.A. 8).

2. Petitioner further contends (Pet. 10-17) that his illegal lottery operations were not conducted "within the probation period", 18 U.S.C. 3653, and hence cannot form the basis for the revocation of his probation. This claim was recently rejected in *United States* v. *Ross*, 503 F.2d 940 (C.A. 5), on facts essentially identical to those presented here. In *Ross*, the defendant had been sentenced to three years' imprisonment, with all but four months of the term suspended, and was placed on probation for five years. The court briefly stayed execution of the sentence to allow the defendant to arrange his business affairs. During the stay, Ross was arrested for possession of narcotics and, as a result, his probation was revoked. Finding the revocation of probation to be a proper exercise of the district court's discretion, the Fifth Circuit held (503 F.2d at 943):

> Sound policy requires that courts should be able to revoke probation for a defendant's offense committed before the sentence commences; an immediate return to criminal activity is more reprehensible than one which occurs at a later date.[5]

[5] The propriety of a revocation based on criminal conduct occurring before commencement of the probation period was recognized in *Cline* v. *United States*, 116 F.2d 275 (C.C.A. 5), where the district court revoked the probation of a prisoner who was discovered to be in possession of narcotics while

Moreover, the broad power of the district court to "revoke or modify any condition of probation" derives from the unqualified language of 18 U.S.C. 3651, rather than from 18 U.S.C. 3653, upon which petitioner relies. Section 3653 merely details the procedures by which, "[a]t any time within the probation period, the probation officer may for cause arrest the probationer" and empowers the district court to "issue a warrant for [the probationer's] arrest for violation of probation occurring during the probation period."[6] This language cannot reasonably be construed to limit the broad grant of authority to the court in Section 3651 to revoke or modify the period or conditions of probation and to impose probation only "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." See *United States* v. *Ross*, *supra*, 503 F.2d at 943.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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awaiting transportation to prison. See also *United States ex rel. Sole* v. *Rundle*, 435 F.2d 721 (C.A. 3), and *Longknife* v. *United States*, 381 F.2d 17 (C.A. 9), certiorari denied, 390 U.S. 926, in which probation was revoked before the probation period had commenced because of misrepresentations made by the defendant to the court during the sentencing proceeding.

[6] Petitioner was never arrested for a violation of probation.

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